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NO. 83-5454

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

CLARENCE WOMACK,

Petitioner

v.

STATE OF ALABAMA

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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NOV 9 1983

QUESTIONS PRESENTED FOR REVIEW

1. Does the fact-dominated issue of whether the petitioner's confession was voluntary present any questions worthy of review by certiorari?

2. Should this Court review the issue of whether the jury was properly instructed where the Alabama Supreme Court's decision was based upon an independent and adequate state ground?

3. Should this Court consider whether the petitioner's sentence was in fact proportionate as compared with the treatment of the codefendant where the petitioner was sentenced under a constitutionally valid procedure designed to assure proportionality in sentencing?

4. Should this Court consider issues not presented to courts below and not decided by them?

PARTIES

The caption contains the name of all parties in the court below.

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the petitioner's conviction and death sentence, Clarence Womack v. State of Alabama, No. 3 Div. 567 (Ala. Crim. App. Feb. 1, 1983), is not yet published. A copy of the manuscript opinion is attached as Appendix B to this brief.

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision, Clarence Womack v. State, No. 82-546 (Ala. July 8, 1983), is not yet published. A copy of the manuscript opinion is attached as Appendix A to this brief.

JURISDICTION

The decision of the Alabama Supreme Court from which the petitioner seeks relief was entered on July 8, 1983, and the petitioner's timely application for rehearing was overruled on August 5, 1983. The petitioner's scheduled execution was stayed by Justice Powell in an order dated September 26, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The facts of the crime, as found by the trial court in its sentencing order, are as follows:

> On February 2, 1981, sometime between the hours of 10:00 a.m. and noon, the defendant, Clarence Womack, together with Charles "Nannygoat" Johnson entered the City Curb (a small curbside grocery store) located at 222 West Jeff Davis Avenue in Montgomery, Alabama.
>
> Either the defendant or Johnson approached the deceased, Mr. Arthur Bullock, who was behind the store counter, pulled a pistol and demanded Bullock's money. The deceased made some motion as if perhaps to reach for a weapon and was shot. The defendant and Johnson ran from the store without taking any property.
>
> Later that day, the defendant confided these events to Rex Jones (who subsequently testified against him at the trial in this case). On February 7, 1981, the defendant gave a written statement to Officer Ward of the Montgomery Police Department in which he confessed the crime.

Clarence Womack v. State of Alabama, No. 3 Div. 567 (Ala. Crim. App. Feb. 1, 1983), Manuscript opinion [Ms. op] at 20-21 (quoting R. 1156 & 1157) [App. B].

On June 5, 1981, the petitioner was indicted by the Montgomery County Grand Jury for the Code of Alabama 1975, § 13A-5-31(a)(2) capital offense of "[r]obbery or attempts thereof when the victim is intentionally killed by the defendant." (R. 1118 &1119). At arraignment on June 15, 1981, the appellant pleaded not guilty (R. 1121). On July 29, 1981, the petitioner filed a Motion for Individual Voir Dire and sequestration of jurors during Voir Dire (R. 1129 & 1130); this motion was denied on March 10, 1981 (R. 1137). On July 29, 1981, the petitioner filed a Motion to suppress; this motion was denied after oral argument on March 1, 1982 (R. 1135).

The petitioner's trial commenced on March 22, 1982; after hearing the evidence, the jury found the petitioner guilty of the capital offense as charged in the indictment (R. 1120, 1144). Thereafter, in accordance with the mandate of the Alabama Supreme Court in Beck v. State, 396 So.2d 645 (Ala.

1981), a sentencing hearing was conducted on March 22, 1982, before the jury, which resulted in an advisory verdict by the jury recommending on March 25, 1982, that the petitioner be sentenced to death (R. 1150). On April 23, 1982, the petitioner filed a motion for new trial (R. 1151 & 1152), which motion was denied on April 27, 1982 (R. 1153).

After the advisory verdict of the jury, in accordance with Beck v. State, supra, the trial court entered on May 4, 1982, its own findings as to the aggravating circumstances, as provided under Code of Alabama 1975, § 13A-5-35, and the mitigating circumstances, as provided under Code of Alabama 1975, § 13A-5-36 or found otherwise to exist (R. 1157-1159). The trial court then, as mandated in Beck v. State, supra, weighed the aggravating and mitigating circumstances found to exist, and, finding the aggravating circumstances to outweigh the mitigating circumstances, sentenced the petitioner to death (R. 1159, 1154).

On February 1, 1983, the Alabama Court of Criminal Appeals issued an opinion affirming the petitioner's conviction and sentence [App. B]. On March 1, 1983, that Court overruled the petitioner's application for rehearing.

Certiorari was granted by the Alabama Supreme Court as a matter of right pursuant to Alabama Rule of Appellate Procedure 39(c), and on July 9, 1983, that Court issued an opinion affirming the Alabama Court of Criminal Appeals decision in the case [App. A]. On August 5, 1983, the Alabama Supreme Court overruled the petitioner's application for rehearing. On August 23, 1983, the Alabama Supreme Court entered an order fixing the punishment of the petitioner at death and setting the time for execution at 12:01 a.m. on September 30, 1983. Application for a stay was denied by the Alabama Supreme Court on September 13, 1983.

On September 22, 1983, the petitioner filed a petition for writ of certiorari in this Honorable Court, and on September 26, 1983, Justice Powell issued an order staying

the petitioner's execution pending consideration of the petition.

SUMMARY OF ARGUMENT

The petitioner challenges the voluntariness of his confession. This issue involves conflicting testimony and, being essentially fact-dominated, is not a substantial federal issue.

The petitioner argues that the jury was improperly instructed as to his liability as an accomplice in the capital offense. This issue was decided based upon an independent and adequate state ground--that it was not preserved for review as the instruction was not objected to and did not constitute plain error under Alabama law--and thus is not a proper subject for certiorari.

The petitioner challenges the constitutionality of his sentencing of death in light of the fact that the co-defendant's case was nol-prossed for lack of substantial evidence. Where as here the petitioner challenges only the sentencing result and not the adequacy of the procedures under which he was sentenced no substantial federal question is presented.

The petitioner raises several other issues, none of which should be addressed by this Court because they were neither raised nor decided below.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the only federal issues raised are insubstantial ones.

I. THE ISSUE INVOLVING THE VOLUNTARINESS OF THE PETITIONER'S CONFESSIONS WAS PROPERLY DECIDED BELOW AND PRESENTS NO QUESTIONS WORTHY OF REVIEW BY CERTIORARI

The first issue referred to in the petition concerns whether the petitioner's confession made to the police was voluntary. Pet. at 4 and 5. The relevant facts are set out in the following paragraphs.

On February 7, 1981, the petitioner, having been brought to the police station the previous day (R. 629), was advised on his constitutional rights (R. 630). The petitioner told the officer interrogating him that he had an eleventh grade education and that he understood his rights (R. 631-633). The petitioner refused to sign the waiver of rights form but stated that he understood the rights as read to him (R. 631-633). Neither threats of violence, nor promises, nor any other type of inducement were made in order to obtain a statement from the petitioner (R. 634). After being told that he had been picked out of a lineup by a witness, the petitioner made an oral statement to the police, in which he said that he and Charles (Nanny Goat) Johnson went into the City Curb Market to rob the owner, and that after they entered the store Johnson shot the owner (R. 637). The oral statement was written down by the officers (R. 637 & 638). The written statement was then read back to the petitioner; after he indicated that it was correct, the petitioner signed it (R. 645 & 646). The written statement was as follows:

> "Monday me and Nanny-Goat was walking over on Jeff Davis Avenue and Nanny said, let's get the man's money. And we was right at the City Curb, so I knew what store he was talking about. We went into the store and walked around until this woman that was in there left. I asked the man at the counter for some cigarettes and matches. The man gave me a pack of Kool cigarettes and some matches. I paid him, and that's when Nanny pulled the pistol and told the man that this was a stickup. The man turned around and started reaching under the counter, and Nanny shot him. I ran out the door and went home. I don't know where Nanny went."

Clarence Womack v. State, No. 3 Div. 567, (Ala. Crim. App. Feb. 1, 1983) Ms. op. at 6 [App. B].

The petitioner contends that he could not read and thus that he did not understand the statement, despite the fact

that it was read to him. In support of this assertion he points to the following testimony: (a) his own testimony that he has a sixth grade education and that he cannot read or write well (R. 782); (b) the testimony of Dr. Marian Shinbaum that based on the petitioner's claimed recognition of only ten letters of the alphabet she concluded that he could not read whole words, only letters (R. 949); and (c) the testimony of Officer Ricky Moore that there was an unsigned waiver of rights form in the petitioner's file on which was written, "cannot read well and does not know what he is signing" (R. 114).

The petitioner also claims that his statement was involuntary because he was handcuffed to a chair while he was being interrogated (R. 104), although there was testimony that no threats or promises or any type of inducement were used to get the petitioner to make a statement (R. 634).

The Alabama Court of Criminal Appeals addressed and decided the confession issue as follows:

> Officers R. T. Ward and Martha Cochran both testified at the suppression hearing and at the trial that the appellant was given his Miranda warnings and he then gave a statement that was reduced to writing by Officer Ward. The two officers stated the appellant's statement was made free of threats, coercion, or offer of reward or other inducement. Officer Ward gave the statement to the appellant to read and he signed it in the presence of our officers, who testified that no threats or promises or other inducements were made to the appellant in order to obtain his signature.
>
> . . .
>
> The appellant claims that he could not read and signed the statement without knowing what was contained within it. "While an accused's intelligence and literacy are important factors to be considered..., weak intellect or illiteracy alone will not render a confession inadmissible." [cite omitted] The appellant told the officers he had an eleventh grade education. When asked whether the statement was correct, he said that it was and signed the statement. The trial court determined that the appellant's level of literacy and intellect did not render his confession inadmissible and we hold the trial judge did not abuse his discretion in making that decision.

Clarence Womack v. State, No. 3 Div. 567 (Ala. Crim. App. Feb. 1, 1983), Ms. op. at 12 and 13 [App. B]. The Alabama

Supreme Court decided similarly:

> The resolution of the first issue by the Court of Criminal Appeals is correct. The facts of the accused's interrogation are correctly set forth in the opinion of that court. Two police officers were present when Womack's statement was given, after he had been advised of his Miranda rights. These officers testified that no threats, coercion, offers of reward or other inducements were made to Womack. When his statement was given to him, Womack was given the written version to read. He was asked if it was correct and he answered affirmatively, signing it after he had looked at both pages. Although petitioner contends that he signed the statement without knowledge of its contents because, he asserts, he cannot read, the Court of Criminal Appeals cited correctly cases holding that illiteracy, though a consideration, does not itself render a confession involuntary. See also Elrod v. State, 281 Ala. 331, 202 So.2d 539 (1967). The facts surrounding the statement and its execution were exhaustively explored at the trial, and there is substantial evidence that the confession was voluntary, understood by the petitioner, and that the written version was knowingly signed by him. Thus, no error was committed by the trial court by allowing it into evidence.

Clarence Womack v. State, No. 82-546 (Ala. July 8, 1983), Ms. op. at 2 [App. A].

This Court generally does not sit to review state court factfindings, see e.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc. 445 U.S. 97, 111-112 (1980); N.L.R.B. v. Waterman S.S. Corp., 309 U.S. 206, 208 (1940). The controlling factfinding of the Alabama appellate courts is that the evidence at trial refutes the contention that the petitioner's confession was involuntarily given and improperly admitted. Unless this Court wishes to squander its limited certiorari assets and become just another step on the direct appeal ladder, it should deny certiorari as to this issue.

II. THE ISSUE OF WHETHER THE JURY WAS CORRECTLY INSTRUCTED WAS DECIDED BASED UPON AN INDEPENDENT AND ADEQUATE STATE GROUND AND THUS IS NOT A PROPER QUESTION FOR CERTIORARI

The issue of whether the jury was correctly instructed was decided adversely to the petitioner by the Alabama Supreme Court based upon an independent and adequate state ground--that the lack of an objection at trial waived the issue for appellate review because the error was not "plain error"

within Alabama's "plain error" rule as provided in Rule 45A, Alabama Rules of Appellate Procedure. Clarence Womack v. State, No. 82-546 (Ala. July 8, 1983) [App. A]. The state courts have the primary responsibility to interpret and apply their plain error rules. Engle v. Isaac, 456 U.S. 107, 135 n. 44 (1982). Notwithstanding the copresence of federal grounds, this Court will decline to review a state court judgment which rests upon an independent and adequate state ground, including procedural default. Fay v. Noia, 372 U.S. 391, 398 (1963). Thus this Court should not grant certiorari as to this issue because the state court judgment rests upon an independent and adequate state ground.

III. THE CASE BY CASE COMPARISON OF DEATH SENTENCES REQUESTED BY THE PETITIONER IS NOT AN ENDEAVOR WORTHY OF CONSIDERATION BY CERTIORARI

The petitioner complains of the fact that he was convicted and sentenced to death while the case against the co-defendant, Charles Johnson, was nol-prossed for lack of sufficient evidence. He does not attack the sufficiency of the procedure under which he was sentenced, which procedure, under the mandate of Beck v. State, supra, assures that the crime of which the petitioner is convicted is one properly punishable by death; that similar crimes throughout the State of Alabama are being punished capitally, and that the sentence of death is appropriate in relation to the particular defendant. Clarence Womack v. State, No. 3 Div. 567 (Ala. Crim. App. Feb. 1, 1983); Beck v. State, 396 So. 2d at 664. Thus the petitioner only questions the particular result under a constitutionally sufficient procedure of sentencing and appellate review of sentencing, and does not attack the procedure generally on the ground that it does not provide for proportionate sentencing. This Court should not waste its certiorari assets on such a case by case comparison of death sentences where the procedure under which the petitioner was sentenced was obviously constitutionally sufficient.

IV. THE ISSUES PRESENTED BY THE PETITIONER IN HIS ADDENDUM WERE NOT RAISED OR DECIDED IN THE COURTS BELOW; THEREFORE THIS COURT SHOULD NOT CONSIDER THEM AS BASES FOR CERTIORARI

The petitioner raises a number of other issues as bases for certiorari in the Addendum to his petition. These issues have not been presented either to the Alabama Court of Criminal Appeals (see Appendix C and D, copies of the briefs on direct appeal and on rehearing filed on behalf of the petitioner in that court) or to the Alabama Supreme Court (see Appendix E and F, copies of the briefs on certiorari and on rehearing filed on behalf of the petitioner in that court), and have not been considered by those courts in their opinions in this case (App. A and B). Because these issues were not presented to the courts below and were not decided by them, this Court need not decide them, Moore v. Illinois, 408 U.S. 786, 799 (1972), should not decide them, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974), and has no jurisdiction to decide them. Street v. New York, 394 U.S. 576, 581-582 (1969); Barley v. Anderson, 326 U.S. 203, 206-207 (1945); see 28 U.S.C. § 1257(2) and (3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on the petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Honorable Maurice S. Bell
25 Washington Avenue
Montgomery, Alabama 36104

I further certify that I have served all parties required to be served.

Done this 24th day of October, 1983.

William D. Little

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

JUL 8 1983

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1983

Ex Parte Clarence Womack

82-546

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(Re: Clarence Womack

v.

State)

BEATTY, JUSTICE.

Certiorari was granted to consider three issues: (1) whether the trial court committed reversible error by allowing the petitioner's inculpatory statement to be introduced as evidence; (2) whether the trial court's jury instruction on aiding and abetting was erroneous; and (3)

whether the death penalty should be imposed under the guidelines imposed by Beck v. State, 396 So. 2d 645 (Ala. 1981).

I

The resolution of the first issue by the Court of Criminal Appeals is correct. The facts of the accused's interrogation are correctly set forth in the opinion of that court. Two police officers were present when Womack's statement was given, after he had been advised of his Miranda rights. These officers testified that no threats, coercion, offers of reward or other inducements were made to Womack. When his statement was given to him, Womack was given the written version to read. He was asked if it was correct and he answered affirmatively, signing it after he had looked at both pages. Although petitioner contends that he signed the statement without knowledge of its contents because, he asserts, he cannot read,[1] the Court of Criminal Appeals cited correctly cases holding that illiteracy, though a consideration, does not itself render a confession involuntary. See also Elrod v. State, 281 Ala. 331, 202 So. 2d 539 (1967). The facts surrounding the statement and its execution were exhaustively explored at the trial, and there is substantial evidence that the confession was voluntary, understood by the petitioner, and that the written version was knowingly signed by him. Thus, no error was committed by the trial court by allowing it into evidence.

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1. A prison psychologist gave him an examination and testified that petitioner recognized ten letters in the alphabet and only two letters in his name. Based upon this, she felt Womack was not able to read.

The petitioner was accompanied by one Johnson in the commission of the robbery and contended that Johnson, not he, presented the pistol and shot the victim. A witness, Jones, however, testified that while he was talking with petitioner at the corner of Goode and Early streets petitioner said, "I had to shoot the bitch in the face." Even so, in brief petitioner now argues that the complicity instructions given by the trial court were erroneous because they did not instruct that "mere presence with willingness to assist in the killing is sufficient only if that willingness is known to the principal." Petitioner cites Williams v. State, 403 So. 2d 317 (Ala.Crim.App. 1981), for that proposition. Judge Clark in Williams, at 321, however, expressly recognized this charge on the assistance in abettor situations:

> "In the circumstances of some cases ... the use of the word 'assists' in the charge could be readily but erroneously interpreted by the jury to require express language or active positive conduct on the part of the defendant. The 'assistance' that is necessary and sufficient may be shown by the presence of the defendant with intent to render assistance if necessary if the principal knows that defendant is present at the time and that he intends to render assistance if necessary." (Emphasis added.)

In other words, Judge Clark recognized that one could "assist" by actually assisting, i.e., giving affirmative assistance by words or deeds, etc., or by being present with an intent to assist known to the co-conspirator.

In this case the trial court charged:

> "The evidence in this case, or the testimony in this case, presented by the State indicated that either the Defendant or someone other than the Defendant fired the one shot which killed Mr. Bullock. So let me refresh you on the law of complicity, or aiding and abetting, again. In order to find

> this Defendant guilty of the capital offense as charged in this indictment, you must believe beyond a reasonable doubt from the evidence that while he was committing a robbery or attempting to commmit a robbery or aiding and assisting another to commit a robbery or the attempt to commit a robbery, that he also either by prearrangement--that is, prearrangement or on the spur of the moment--helped, assisted by words, acts, or deeds, or was ready, willing, and able in seeing that Arthur Bullock was intentionally killed. In other words, just the contemplation of the robbery is not enough. He would also have to be implicated by affirmative action: words, assistance, deeds in the intentional killing of Arthur Bullock.
>
> "You must look to all of the surrounding facts and circumstances. You can't look into somebody's mind. To determine whether there was an intentional killing in this case, you must consider all of the facts and circumstances as you find them from the evidence in this case, and use your common sense in making that determination, and the inferences which naturally and logically spring from the evidence in this case to determine if this Defendant aided and abetted or participated in a robbery, as I have defined that crime of robbery to you, and also aided, assisted, helped, was ready, willing and able if it became necessary in the intentional killing of Arthur Bullock."

Petitioner made no objection as to the content of this charge, instead he merely asked for an instruction to the effect that the length of the charge did not reflect the wishes of the court. The court gave such a requested charge. Petitioner announced satisfied.

The problem is reduced to whether it was plain error under Rule 39(k), A.R.A.P., for the trial court not to instruct that "assistance" required the other participant's (the principal's) knowledge that the defendant intended to render assistance if necessary.

The State argues that this was not "plain error" because the petitioner himself never indicated any reliance on such a defense; that is, instead of defending on the basis that he had no intent to kill but only to rob, his defense was alibi: he denied being present and denied any knowledge of the crime. Consequently, the State argues, and we agree, that the failure to charge the matter referred to above was not a "particularly egregious error" and would not result in a miscarriage of justice if a reversal was denied. That position follows United States v. Frady, 102 S. Ct. 1584, 1592 (1982), and the federal "plain error" rule as stated in United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir. 1981): "'Plain error' only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." In that case the court found no "plain error" in an evidentiary ruling after the defendants had failed during trial to assert a theory later argued on appeal. See also Rule 45A, A.R.A.P.

III

Finally, the petitioner argues in brief (1) that the death sentence was improper, because there was insufficient evidence of the petitioner's intent to kill, and (2) that the death sentence was inappropriate because of disparity in its application. Our review, however, has convinced us that neither of these arguments has merit, and that the opinion of the Court of Criminal Appeals has correctly resolved each of those issues. That court has followed the mandate of this Court, as expressed in Beck v. State, 396 So. 2d 645 (Ala. 1981), and determined that the death sentence imposed here is not out of line with sentences imposed in similar cases, e.g., Ex parte Ritter v. State, 375 So. 2d 270 (Ala.

1979); Raines v. State, [Ms. December 30, 1982] ___ So. 2d ___ (Ala. 1982), notwithstanding that the State of Alabama has chosen to discontinue for the time being the prosecution of the co-defendant, Johnson. Beck, supra, does not make the death penalty inappropriate for one defendant simply because his accomplice is not convicted.

For the reasons stated, the judgment of the Court of Criminal Appeals must be, and is, affirmed.

AFFIRMED.

All the Justices concur.

I, Dorothy F. Norwood, as Acting Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.
Witness my hand this 8 day of July 1983

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

EXHIBIT B

1 FEB 1983

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

3 Div. 567

Clarence Womack

v.

State of Alabama

Appeal from Montgomery Circuit Court

TYSON, JUDGE

On June 5, 1981, Clarence Womack was indicted for the capital offense of murdering Arthur D. Bullock, the proprietor of the City Curb Market located in Montgomery, Alabama, by shooting him with a pistol, during a robbery in the first degree, in violation of § 13A-5-31(a)(2), Code of Alabama,

1975.[1]

The jury found the appellant "guilty of the capital offense as charged in the indictment." Following a separate sentencing hearing, the jury recommended the trial judge "fix punishment at death."

As required by § 13A-5-47, Code of Alabama, 1975, the trial judge entered specific written findings concerning the existence of any aggravating circumstances enumerated in § 13A-5-49 and of any mitigating circumstances enumerated in § 13A-5-51 and § 13A-5-52 and his written findings of fact. After weighing the aggravating and mitigating circumstances applicable to this case, the trial judge accepted the jury's recommendation and sentenced the appellant to death.[2]

The first witness for the state was Dora Helms, who, on February 2, 1981, lived a block away from the City Curb Market. She testified she had know the deceased, Arthur Bullock, for ten years. On February 2, 1981, Mrs. Helms went to the City Curb Market and purchased some groceries from Mr. Bullock. When she returned home, a friend of the family's, Mattie Hunt, was there. Mrs. Hunt soon left the house to go to the City Curb Market. She returned with a six pack of beer. Mrs. Helms then sent her eight year old daughter, Demetrius, to the City Curb Market for a pack of cigarettes. Demetrius returned a few minutes later without the cigarettes because she was unable to find Mr. Bullock. Mrs. Helms became suspicious because she knew Mr. Bullock always locked the store when he was away, even for a few minutes. She then walked outside and saw the police arriving at the City Curb Market. Mrs. Helms went back inside, turned on the radio, and learned that Mr. Bullock had been killed.

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[1] The Alabama Legislature repealed § 13A-5-31(a)(2) on July 1, 1981. However, the act provides that the repeal of § 13A-5-31(a)(2) does not affect the application of pre-existing law to conduct occurring before the effective date of the act. Acts 1981, No. 81-178, § 19,20.

[2] The trial court's judgment of sentence, dated April 30, 1981, is hereto made a part hereof and attached as Appendix A. (Volume 6, P. 1154-1160).

Mattie Hunt testified that on February 2, 1981, sometime after 11:00 a.m., she went to the City Curb Market to purchase a six pack of beer. As she was leaving the store, the appellant came in and asked Mr. Bullock for a pack of cigarettes and some matches. She left and went back to the Helms' home to watch television. Mrs. Hunt was there when Mrs. Helms sent her daughter to the City Curb Market and when Demetrius returned saying she couldn't find Mr. Bullock. She went outside to see what was going on when she heard the police sirens.

Mrs. Hunt testified she picked the appellant out of a photographic line-up and also a live line-up. She also made an in-court identification of the appellant.

James Reffin testified he was employed as a route salesman for the Flowers Baking Company on February 2, 1981. Sometime between 11:30 a.m. and 12:00, he was making a delivery to the Pricebreaker Grocery Store, which is located in the same block as the City Curb Market. While he was there, a man came in and following a conversation with him, the two went to the City Curb Market and found Mr. Bullock lying on the floor behind the counter. There was blood on Mr. Bullock and on the floor and he appeared to be dead. The two men went back to the Pricebreaker and called the police.

Beverly Rambo, a corporal with the Montgomery Police Department Investigative Division, testified she received a call to go to the City Curb Market on February 2, 1981, at approximately 11:55 a.m. When she arrived there, she found Mr. Bullock lying on the floor with what appeared to be an exit wound out of the right side of his neck. She notified headquarters of what she had found, secured the scene and turned it over to the evidence technician, Tommy Shanks, when he arrived.

Lawrence Rutland was employed in the Robbery-Homicide Unit of the Montgomery Police Department on February 2, 1981.

When he arrived at City Curb Market, he found Mr. Bullock lying on the floor behind the counter with a gunshot wound to the neck and powder burns on his jaws and cheek. Rutland followed the ambulance to the morgue and identified the body as being that of Arthur Bullock, whom he had known for several years because he had responded to calls at the City Curb Market in the past.

Lonnie Ray Hardin testified he is employed by the Department of Forensic Sciences and that he had brought with him evidence, in the Bullock case, which had been submitted to him as a custodian of the Department of Forensic Sciences.

T.R. Shanks testified he was an evidence technician with the Montgomery Police Department on February 2, 1981. When he arrived at the crime scene, he searched for and collected evidence, took pictures of the store and checked for fingerprints. He found a spent bullet at the scene, which was later determined to be a .32 caliber bullet. To the best of his knowledge, the weapon used to kill Mr. Bullock had not been found.

Dr. Thomas Gilchrist testified that he is a forensic pathologist employed by the Department of Forensic Sciences and that he performed the autopsy on the body of Arthur Bullock on February 2, 1981. He determined that the gun used to shoot Mr. Bullock had been fired at a very close range because of the presence of powder residue found around the wound and on the clothes of the victim. In his opinion, the cause of Mr. Bullock's death was due to a gunshot wound to the neck.

Robert Bullock, the son of the deceased, testified that his father kept approximately $150 to $200 operating money in the store and several hundred dollars cash in his sock. After conducting an inventory, Bullock determined that some money was missing.

Lonnie Ray Hardin was recalled by the State and testified he is a firearms and tool mark coordinator with the Department of Forensic Sciences. He examined the bullet found at the crime scene to determine the caliber of the bullet and, if possible, what particular firearm it had been fired through. After examination, he determined the bullet was a .32 caliber. He further testified that this bullet was fired through the same gun that was later used to shoot Mr. Clovis Hitson during an unrelated robbery. However, the weapon used in both these cases has not been recovered.

Rex Hussey Jones (also known as Black Bubba), an inmate at Holman Prison, testified that at approximately 2:30 p.m. on February 2, 1981, he saw the appellant and Charles Johnson (also known as "Nanny Goat") at the corner of Goode and Early Streets. The three had a conversation about getting high.

The appellant told Jones that he and Johnson had been on "a lick" at the City Curb Market. Jones asked the appellant how much money they got and he replied, "[T]he bitch wouldn't give no money." (R. 553) so "I had to shoot the bitch in the face." (R. 553). Johnson told Jones that he didn't think anyone saw them because he was bent over as he ran to prevent the pistol from falling out of his pants.

At this point, Jones and the appellant went to the parole officer together. Then the appellant, Jones, Johnson and Neil Martin went to Trenholm Court to "shoot dope." While they were at the dope house, Jones saw a pistol on both the appellant and Johnson. The appellant had a dark pistol; however, Jones had seen him with a light colored pistol on other previous occasions.

Jones testified he was serving a term in prison for robbery, and had pled guilty to four other robberies, but had not yet been sentenced. He further testified that he had not been promised anything in return for his testimony.

This witness said Neil Martin told him he was going to get out of this mess in some way. Martin asked Jones to burn him on the arm with a cigarette, which he did, so he could say police had burned him.

R. T. Ward, a corporal in the Robbery-Homicide Division of the Montgomery Police Department, testified he took the appellant's statement on the night of February 7, 1981. Prior to taking the appellant's statement, Ward read him his Miranda rights. The appellant told Ward he had an eleventh grade education and understood what had been read to him, but refused to sign the "rights form." Officer Martha Cochran was present when Ward read the appellant's rights and during the time the statement was taken.

Ward said the appellant did not appear to be under the influence of drugs or alcohol at the time, and he never requested an attorney or asked to remain silent. No threats or promises or other inducements were made, and no violence was used in order to get the appellant to make a statement.

Ward informed the appellant that he had been picked out of a line-up by a witness, and the police had received other information indicating the appellant and Johnson were involved in the Bullock case. At this point, the appellant gave an oral statement to Ward, who wrote it down and then typed it. Ward then asked the appellant if the statement was correct. He replied that it was, and signed his name to the statement in the presence of four other officers. The appellant's statement reads as follows: (Volume IV, p. 640).

> "Monday me and Nanny-Goat was walking over on Jeff Davis Avenue and Nanny said, let's get the man's money. And we was right at the City Curb, so I knew what store he was talking about. We went into the store and walked around until this woman that was in there left. I asked the man at the counter for some cigarettes and matches. The man gave me a pack of Kool cigarettes and some matches. I paid him, and that's when Nanny pulled the pistol and told the man that this was a stickup. The man turned around and started reaching under the counter, and Nanny shot him. I ran out the door and went home. I don't know where Nanny went."

The State then rested and the trial judge denied the defense's motion to exclude the evidence and the motion for a directed verdict.

The first witness for the defendant was Neil Martin, who testified he knew the appellant, Rex Jones, and Charles Johnson but that he did not see the appellant or Rex Jones on the afternoon of February 2, 1981. He told the court that Officer Ward had burned his arm with a cigarette. He stated he is an inmate in Holman Prison serving three consecutive life sentences. Martin testified he sent letters concerning this case to defense attorney Maurice Bell and the District Attorney, Jimmy Evans, in the summer of 1981.

While Martin was in the city jail, he saw Charles Johnson with Officers Ward and Carmichael. Johnson looked like he had been beaten.

Rex Jones told Martin he had been promised lighter sentences if he would agree to testify against the appellant. The witness invoked his Fifth Amendment privilege in response to many questions.

Pauline Eubanks testified she is the Circuit Clerk of Montgomery County, Alabama, and the records show that Rex Jones pled guilty to four charges of robbbery in the first degree. Each of those cases has been continued for sentencing.

The appellant testified he had been convicted of burglary, grand larceny and robbery and had spent a number of years in the penitentiary. He was paroled in March of 1979, and since that time had been working as a laborer.

He stated he quit school in the sixth grade and was not able to read nor write very well.

On February 2, 1981, the appellant did not go to work because there was ice on the ground. That morning he got up around 8:00 a.m. and went to pay his rent. He then went to Smiley Court and ran into Charles Johnson and two "dudes" named Junior and Red. They all smoked a joint. Then

he and Johnson went to his mother's house at Young-Forte Village and had a drink. Around 10:30 a.m., the two went to Fanny Hawkins' house where they shot dice and drank. They left her house a little after 12:00 p.m.

On Friday, February 6, 1981, the appellant's mother told him the police were looking for him. Around 3:00 p.m., he went to the police station and turned himself in. When he arrived at the police station, he was not drunk but had been drinking. The police told the appellant they had been informed he killed Mr. Bullock. At this point, Rex Jones was brought in and he told the police the appellant was the one. The appellant denied killing Mr. Bullock and insisted he knew nothing about the murder.

The appellant was questioned for several hours Friday night. He claimed he asked for an attorney but was not allowed to see one. During the interrogation, he was handcuffed to a chair and beaten with his tennis shoes.

The next night the appellant was again questioned for several hours. The police beat and kicked him. He was placed in a line-up and was told he had been identified by a witness. The police did allow him to call his mother but still refused him an attorney. He testified he finally wore down and signed the statement that Officer Ward had already prepared. He denied that he had said anything that was contained in the statement. When he was given the statement to read, he did not read it because he couldn't read. He signed it to prevent any further beatings. The police then took him to find Johnson. When they picked him up, the police beat and kicked Johnson. The appellant later saw Johnson in jail and said his face was swollen and he was unable to walk.

On cross-examination, appellant admitted he did not complain about the beatings until after he had been arrested and indicted for murder. He said he did not request medical attention and there were no visible signs of injury but he was sore.

Maurice Bell testified he is the attorney for the defense and went to see the appellant in jail at the request of the appellant's mother. The appellant told Bell he had been beaten by the police but Bell admitted he did not see any evidence of injury.

Shirley Arndt testified that she is employed as a nurse for the Montgomery County Jail and is the custodian of the medical records for the jail. She did not see the appellant but did attend Johnson.

Johnson complained of chest and groin pains and said his eye was sore. He claimed he had been beaten but Nurse Arndt said he did not appear to have been beaten except for some minor bruises.

Dr. Sanders examined him and treated him for a chest cold and pink eye.

Harry Park testified he was employed by S & K Restaurant on February 2, 1981. Rex Jones was also employed there at that time and worked 6:00 a.m. until 2:00 p.m. on February 2, 1981. Park stated he would have known if Jones had left work during that time.

J. B. Andrews testified he is employed by the Montgomery Police Department. He was questioned about the procedures he follows when taking statements. Andrews worked on this case and was the one who conducted the line-ups. He showed Mrs. Hunt fourteen photographs and she picked out the appellant.

Andrews then arranged a live line-up. Each of the individuals had a beard and were dressed alike. Mrs. Hunt again picked the appellant.

Dr. William Sanders testified he is a physician hired by Montgomery County to attend prisoners. He treated Johnson for a chest cold and pink eye and said Johnson possibly may have had a hernia. Dr. Sanders did not see any evidence that Johnson had been beaten.

Thomas Gilkeson testified he was Director of Inmate Records for the Department of Corrections and allowed Dr. Marian Shimbum

to examine the appellant's records.

Dr. Marian Shimbum testified she is a psychologist and is employed by the State Board of Corrections at Kilby. She is in charge of evaluation, classification and the placement of new inmates. Based on her examination of the appellant's intelligence test scores, she determined the appellant was mildly mentally retarded. She testified that the appellant was only able to recognize ten letters of the alphabet and only two letters in his name. Based on this information, she did not feel the appellant was able to read.

D.H. Carmichael, an officer with the Montgomery Police Department, testified about his procedures in taking statements. When the appellant came i to the police department, Carmichael read him his rights. The appellant seemed to be under the influence of some form of intoxicant but was coherent.

Carmichael was accused of beating the appellant, but on both nights in question he was not working and was at home.

Shirley Arndt was recalled by the defense and testified she treated Neil Martin in the city jail on February 27, 1981 for two burns on his arm.

Charles Edward Cole testified he dates the appellant's sister. He was with the appellant on February 2, 1981, but last saw him around 10:00 a.m.

Annie Ray Womack, the mother of the appellant, testified she saw the appellant at 9:30 or 10:00 a.m. and then again at 1:30 or 2:00 p.m.

William Morgan Harris testified he was employed as a supervisor of the jail and is the custodian of the records. He testified as to the times when the appellant and Jones were removed from their cells.

At this time, the defense rested and the State put on several rebuttal witnesses.

Eddie Norred testified he was employed by the Montgomery Sheriff's Department as a jail sargeant. He stated that the appellant and Neil Martin were never in the same cell.

Ralph Connor testified he was employed by the Montgomery Police Department. On April 2, 1981, the date of the appellant's preliminary hearing, he was present in the courtroom on an unrelated case. He was seated on the front row along with ten to fifteen officers. He overheard a conversation between the appellant and his attorney, Maurice Bell. Bell asked the appellant if he saw any officers in the courtroom who had beat him. The appellant pointed to Connor and said he was one of them.

Conner testified he did not work on the Bullock case, was in the Crimes against Property Division, not the Crimes against Persons Division, and never saw the appellant before that day.

Martha Cochran, an officer with the Montgomery Police Department, testified she was present when Ward read the appellant his rights and when his statement was taken. She stated no threats, promises or violence were used to persuade the appellant to make his statement. The appellant told them, "I did it but I didn't shoot him. Another person by the name of Nanny Goat did." (R. 1008).

The defense recalled the appellant who testified that he never said Connor beat him.

At the sentencing phase of the trial, Al Smith testified for the State. He is employed by the State Board of Pardons in the Field Office in Montgomery as a probation and parole officer. The appellant had been under his supervision.

The appellant was sentenced to twenty-five years in the penitentiary for robbery in December, 1971. His sentence went into effect in March, 1973 and served time until he was paroled in March, 1979. The appellant was on parole at the time of the offense in question in this case.

According to a classification summary prepared by the Prison Department, the appellant has average intelligence. Smith indicated that the appellant seemed to understand what was said when they had conversations.

The appellant, his mother and his girl friend, Marcella Jackson, all testified and maintained his innocence.

I

Since the appellant's conviction and sentence were the product of a bifurcated trial, we will deal with the guilt and sentence phases separately.

The only issue raised concerning the guilt phase was whether or not the appellant's statement was properly received into evidence.

Prior to trial, the appellant attempted to have his confession suppressed, alleging that he had been coerced into signing a pre-prepared statement by the police, who he claimed had beaten him.

Officers R. T. Ward and Martha Cochran both testified at the suppression hearing and at the trial that the appellant was given his Miranda rights and he then gave a statement that was reduced to writing by Officer Ward. The two officers stated the appellant's statement was made free of threats, coercion, or offer of reward or other inducement. Officer Ward gave the statement to the appellant to read and he signed it in the presence of our officers, who testified that no threats or promises or other inducements were made to the appellant in order to obtain his signature.

"The voluntariness of a confession, authorizing its admission into evidence, must be determined by the trial judge in the exercise of enlightened discretion . . . " Burks v. State, 353 So.2d 539 (Ala.Crim.App. 1977). When conflicting evidence is presented concerning the facts and circumstances surrounding a confession, the trial judge must decide on its admissibility. Hobbs v. State, 401 So.2d 276

(Ala.Crim.App. 1981). The trial court's decision will not be overturned on appeal unless it appears to be palpably contrary to the great weight of evidence or is manifestly wrong. Burks v. State, supra.

The trial judge, after hearing the testimony of the officers and the appellant, ruled the confession was voluntarily and intelligently made and allowed it to go to the jury on its credibility. We hold there was sufficient evidence to support the trial court's findings in this regard and we will not disturb that decision in our review.

Once the confession is admitted into evidence, any controverted testimony for the defendant goes to the jury. Hobbs v. State, supra. The appellant was allowed to present evidence and cross-examine the State's witnesses in an attempt to persuade the jury that his confession was not freely and voluntarily given.

The appellant claims that he could not read and signed the statement without knowing what was contained within it. "While an accused's intelligence and literacy are important factors to be considered . . ., weak intellect or illiteracy alone will not render a confession inadmissible." Hobbs v. State, supra. The appellant told the officers he had an eleventh grade education. When asked whether the statement was correct, he said that it was and signed the statement. The trial court determined that the appellant's level of literacy and intellect did not render his confession inadmissible and we hold the trial judge did not abuse his discretion in making that decision.

Therefore, we hold that the confession was intelligently and voluntarily made and was properly admitted into evidence.

II

The Supreme Court of Alabama's decision in Beck v. State, 396 So.2d 645 (Ala. 1981) requires this court to review each death sentence:

". . .[T]o ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant."

This must be done to ensure that the death penalty is imposed fairly and with uniformity in the State of Alabama. Beck v. State, supra.

The appellant was tried for and convicted of the capital offense of "(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant." § 13A-5-31(a)(2), Code of Alabama, 1975. The appellant contends he should not receive the death penalty under this statute because he was, in fact, the non-triggerman accomplice.

The United States Supreme Court in Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, ___L.Ed.2d ____(1982) addressed this issue and examined the historical development of the felony murder doctrine as it applies to capital cases, including legislative statutes, international opinion and jury verdicts. Of the thirty-six jurisdictions which have implemented death penalty statutes, only a small minority (nine) authorize the imposition of the death penalty solely for participation in a robbery in which another robber commits a murder.

". . .Eleven states require some culpable mental state with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized. Of these 11 states, 8 [including Alabama] make knowing, intentional, purposeful, or premeditated killing an element of capital murder." (Bracketed text added).

Enmund v. Florida, supra.

The United States Supreme Court in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) stated that:

". . .Under the Alabama death penalty statute the requisite intent to kill may not be supplied by the felony-murder doctrine[2]."

They further stated in footnote 2 of that opinion:

> "In Ritter v. State, 375 So.2d 270, 275 (1979), cert. pending, No. 79-5741, the Alabama Supreme Court held that the State could not satisfy its burden of proof under the new death penalty statute simply by showing that the defendant intended to commit robbery or even by showing that he should have known that there was a substantial possibility that someone would be killed. Although the State is not required to prove that the defendant was the actual triggerman, it must show that he had a 'particularized intent' to kill the victim or that he 'sanctioned and facilitated the crime [of intentional killing] so that his culpability is comparable to that of' the actual killer."

Therefore, the death penalty can be imposed upon a non-triggerman accomplice if there is proof of a culpable mental state. Ritter v. State, supra.

We take note that the United States Supreme Court has concluded, after examining legislative enactments and jury decisions, that the Eighth Amendment does not permit the imposition of the death penalty on a defendant "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund v. Florida, supra.

However, "the accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying felony. Ritter v. State, 375 So.2d 270 (Ala. 1979). An accomplice to the intentional killing is one who aids and abets the killing by any assistance rendered through 'acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary.' " Id. at 274. Ex Parte Raines [Ms. 81-746, December 30, 1982], ___So.2d ____(Ala. 1982).

The question before this court is whether there is sufficient evidence contained in this record which would prove this appellant had the "particularized intent" to kill.

The appellant contends he was a minor participant in the robbery and did not intend the killing of Mr. Bullock. However, the evidence presented at trial indicates otherwise. The appellant was the one person who could positively be placed at the scene of the crime and he was the person who went into the store and asked Mr. Bullock for the cigarettes and matches.

We can hardly therefore say that the appellant was a minor participant in the robbery. There was also testimony that both the appellant and Johnson had guns on them immediately after the murder, and that this appellant, not Johnson, actually killed the victim. Rex Jones testified that the appellant stated he "had to shoot the bitch in the face."

We thus conclude there was sufficient evidence presented at trial from which the jury could infer that this appellant was prepared to kill, intended to kill, and supported Johnson in the killing of Mr. Bullock, if he was, in fact, not the actual triggerman himself.

The jury was given proper instructions on the "intent to kill requirement." The trial judge charged on the relationship between complicity, aiding and abetting, and intent to kill. He made it clear to the jury that the felony murder doctrine was relevant only to the lesser included offense of non-capital murder, and that there could be no conviction for the capital offense absent a finding beyond a reasonable doubt that the appellant possessed the intent to kill. The existence of the intent to kill was a question of fact for the jury.

We hold that the state proved this appellant had the necessary culpable mental state in Mr. Bullock's murder, and

that his conviction of this capital offense should be upheld and that he was properly sentenced to death. Ex Parte Raines, supra.

III

We are commanded by the Alabama Supreme Court to examine one final issue. This court is required to ". . .[e]xamine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any." Beck v. State, supra.

The Office of the Attorney General by letter dated November 10, 1982, has notified this court that "since the briefs were filed in this case, a stipulation has been filed concerning disposition of the charges that had been pending against co-defendant Charles Johnson. The stipulation, which incorporates a motion to nol pros filed in the Johnson case, indicates that the charges against Johnson have been dismissed, at least for the time being because of insufficient evidence against Johnson."

We recognize it would be difficult to prosecute Johnson for this offense because it was impossible to place Johnson at this crime scene by any known witness. Similar crimes to the one on this appeal are being punished by the death penalty throughout the state. See Ex Parte Raines, supra, and Ex Parte Ritter, supra. We cannot infer that just because the state was unable to make out a proper case against Johnson, that there was insufficient evidence presented during the trial to convict this appellant, Womack.

For the reasons stated above, the appellant's conviction and sentence of death are due to be and the same are hereby, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX A

JUDGMENT AND SENTENCE OF THE COURT

FRIDAY, APRIL 30, 1982

COURT MET PURSUANT TO ADJOURNMENT

PRESENT THE HONORABLE WILLIAM R. GORDON, JUDGE PRESIDING

STATE OF ALABAMA

VS. CC-81-861 OFFENSE - MURDER

CLARENCE WOMACK

This day came the State by its District Attorney and came also the defendant in his own proper person and by his attorney, Honorable Maurice Bell, and it appearing to the court that the said Defendant was duly convicted of said offense on a former day of this court, and the said defendant being asked by the court if he had anything to say why the sentence of the law should not now be pronounced upon him, says nothing in bar or preclusion of sentence.

It is therefore considered and adjudged by the court and it is the judgment and sentence of the court that the Sheriff of Montgomery County, Alabama, shall remove the said defendant, Clarence Womack, to the Montgomery County Jail where he, the said Clarence Womack shall remain in custody until the 30th day of June, 1982, and on said day he, the said Clarence Womack shall be removed to the William C. Holman unit of the Prison System of Alabama at Atmore, Alabama, and on said day in strict accordance with the law, the Warden of Holman Prison at Atmore, Alabama shall put the said Clarence Womack to death by causing to pass through the body of said Clarence Womack a current of electricity of sufficient intensity to cause the death of the said Clarence Womack, and that the application and continuance of such current of electricity to pass through the body of the said Clarence Womack until he, the said Clarence Womack is dead.

And it is further ordered by the court that the Clerk of this court shall issue the necessary warrant for the execution of the said Clarence Womack as required by law.

CIRCUIT COURT

FIFTEENTH JUDICIAL CIRCUIT

CC-81-861-G

STATE OF ALABAMA, Plaintiff,	)	
v.	)	SENTENCING ORDER
CLARENCE WOMACK, Defendant.	)	

The case of Clarence Womack is presented to the court upon the unanimous recommendation by jury that the death penalty be imposed upon him. This recommendation was made after a separate sentencing hearing which was conducted by the same jury that had previously found the defendant guilty of the capital offense as charged in the indictment. The procedures followed are set out in Alabama Code §§13A-5-30 et seq. as modified by the decision in Beck v State, 396 So 2d 645 (Al. 1980).

The court ordered and received a pre-sentence report which has been made part of the record in this case. No part of this pre-sentence report has been, or shall be, kept confidential.

The State and the defendant have been given the right to present evidence to the court about any part of the report. The court has considered the pre-sentence report as to the background of the defendant and as to other information in the report which is prescribed by law or court rule for felony cases generally. The court, however, has made its own independent analysis of the existence or non-existence of

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aggravating and mitigating circumstances. The court has made its own special application of the facts which the court has heard and carefully reviewed to the enumerated aggravating circumstances and to the mitigating circumstances whether enumerated in §13A-5-36 or not.

The parties have been given full and ample opportunity to present arguments concerning the existence of aggravating and mitigating circumstances. The court now, in accord with §13A-5-33 proceeds to enter written findings of fact summarizing the crime and the defendant's participation therein. The court also proceeds to enter specific written findings concerning the existence or non-existence of aggravating circumstances enumerated in §13A-5-35, each mitigating circumstance enumerated in §13A-5-36, and as to any additional mitigating circumstances offered herein.

SUMMARY OF CRIME AND THE
DEFENDANT'S PARTICIPATION IN IT

On February 2, 1981, sometime between the hours of 10:00 a.m. and noon, the defendant, Clarence Womack, together with Charles "Nannygoat" Johnson entered the City Curb, (a small curbside grocery store) located at 222 West Jeff Davis Avenue in Montgomery, Alabama. Charles Johnson has a capital case arising out of the same event pending against him in this circuit.

Either the defendant or Johnson approached the deceased, Mr. Arthur Bullock, who was behind the store counter, pulled a pistol and demanded Bullock's money. The deceased made some motion as if perhaps to reach for a weapon and he was shot. Bullock died from this injury. The defendant and Johnson ran from the store without taking any property. Later that day, the defendant confided these events to Rex Jones, (who subsequently testified against him at the trial in this case. On February 7, 1981, the defendant gave a written

statement to Officer Ward of the Montgomery Police Department in which he confessed the crime.

ENUMERATED AGGRAVATING CIRCUMSTANCES

The capital offense was committed by a person under sentence of imprisonment. The defendant was serving parole time on his conviction of robbery 1° on October 20, 1971.

The defendant was previously convicted of the offense of robbery on October 20, 1971. The court has considered this offense as a prior conviction of a felony involving the use or threat of violence to the person.

The instant capital offense involves one victim. This offense is not considered by the court to invoke the circumstances set out in §13A-5-35(3).

The capital offense was committed while the defendant was engaged in, or was an accomplice in the commission of, or in an attempt to commit a robbery.

Under the evidence the court does not find that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The capital felony was not committed for pecuniary gain.

The capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The court does not find from the evidence that the capital felony was especially heinous, atrocious or cruel.

MITIGATING CIRCUMSTANCES ENUMERATED AND OTHERWISE PRESENTED

The evidence before the court establishes that the defendant does have a significant history of prior criminal activity, including a robbery conviction, two convictions for grand larceny and one conviction for burglary. The capital offense before this court is the defendant's fourth felony conviction.

The capital felony was not committed while the defendant was under the influence of extreme mental or emotional disturbance.

The victim was not a participant in the defendant's conduct and did not consent to the act. The court finds by a preponderance of the evidence that the defendant was a major participant in the capital offense and that he actively participated in the robbery or attempted robbery with full knowledge.

The preponderance of the evidence establishes that the defendant was not under extreme duress at the time of the capital offense.

The preponderance of the evidence further establishes that the defendant was not under the substantial domination of another person. A preponderance of the evidence convinces this court that the defendant together with his accomplice entered the City Curb with the full intention of robbing the deceased and using whatever force was necessary to cause the deceased to part with his personal property.

The preponderance of the evidence establishes that the defendant did have the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

The preponderance of the evidence establishes that this capacity was not impaired.

In the opinion of the court, from the preponderance of the evidence presented, the defendant knew full well what he was doing and what he was doing was wrong.

The evidence establishes that the defendant was thirty-one years of age at the time of the capital offense.

In addition to the above enumerated mititgating circumstances the defendant, at the sentence hearing conducted by the

court, was given the opportunity to present any further evidence of mitigating circumstances and to make any statement of mitigating circumstances. The defendant, through counsel, only argued that the evidence against him upon which his conviction of the capital offense was based was weak.

The defendant himself upon being given the opportunity to do so made no statement to the court.

CONCLUSION

With all evidence before the court desired by either party, the court weighed the aggravating and mitigating circumstances and weighs these circumstances against each other.

It is the conclusion of this court that the aggravating circumstances overwhelmingly outweigh the mitigating circumstance. Accordingly, the court accepts the sentence of the jury that the penalty of death be imposed upon Clarence Womack.

SENTENCING PROCEDURE

The hearing on aggravating and mitigating circumstances to be held by the court was originally set on April 23, 1982. At that time all parties were present with counsel and the court was informed by the Dept. of Parole and Probation that defendant had failed to cooperate in providing any personal history or other information for inclusion in the pre-sentence report. The court at that time continued the hearing until April 30, 1982 upon being advised by counsel that he would insure that defendant cooperated in the further preparation of the pre-sentence report. The court received further information which is included in the pre-sentence report and without objection proceeded to its hearing set on April 30, 1982. Again at that time the defendant was given the opportunity, together with his lawyer, to make any statements to the court to be considered as a mitigating circumstance in this matter. The defendant declined to make any remarks and formal sentence was entered at that time. All parties and counsel were informed that a formal written Order would follow the sentencing.

DONE and ORDERED in chambers this 4th day of May, 1982.

WILLIAM R. GORDON
Circuit Judge

District Attorney
Maurice Bell

A-24

CLARENCE WOMACK,

APPELLANT

VS.

STATE OF ALABAMA,

APPELLEE

* IN THE COURT OF CRIMINAL
* APPEALS OF ALABAMA
*
* On Appeal from the Mont-
* gomery Circuit Court.
*

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BRIEF AND ARGUMENT OF APPELLANT

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MONTGOMERY, AL 36104
ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

This is a capital murder case. Womack has been sentenced to death.

Clarence Womack was indicted by the Montgomery County Grand Jury in a two count indictment charging him with the intentional murder of a Mr. Bullock during the course of a robbery.

The pretrial motion to suppress his statement was heard and denied.

The trial to determine his guilt followed. Womack was found guilty.

Thereafter the punishment portion of the trial was had before the jury. The jury's recommendation was death.

Then followed the punishment phase of the proceedings before the trial Judge. He sentenced Womack to death.

Motion for a new trial was denied.

STATEMENT OF THE FACTS

A brief summary of the testimony of the State's witnesses follows:

DORA HELMS, who lived about a block from City Curb Market knew Arthur Bullock, the deceased, arrived home about 10 on February 2, 1981. She went to the store and saw Mr. Bullock there. No one(else) was in the store.

When she arrived home from the store Mattie Hunt was there and left. Hunt returned bringing a 6 pack of beer.

She then sent her daughter, Demetrius, to the store. Demetrius returned saying she could not find Mr. Bullock.

Helms walked outside and saw the police and found out that Mr. Bullock had been killed. (R-448,453).

MATTIE HUNT, who lived at 503 Holcombe, went to Mr. Bullock's store on February 2, 1981. It was around 11 or a little after. While she was there someone entered and asked for cigarettes and matches. She left. She identified Womack as that person. She left and returned to Mrs. Helm's house. She later heard sirens at the store. (R-458,462).

JAMES REFFIN, a routeman, knew Mr. Bullock. On February 2, 1981, he was working. Around 11:30 or 12, closer to 12, he was making a call at a nearby store and saw a man; they went together to City Curb Market; I saw Mr. Bullock on th floor behind the counter. We went back to the Pricebreaker

Store to call the police. (R-477,481).

BEVERLY RAMBO of the Montgomery Police Department got a call at approximately 11:55 a.m. and went to City Curb. She described the scene as she saw it. She secured the area. She turned the scene over to her supervisors. (R-481,485).

LAWRENCE RUTLAND, Montgomery Police Department, went to the scene on February 2, 1981. He described what he saw and did there. He left and followed the ambulance to the City morgue. He advised the "Tox" office who Mr. Bullock was. (R-487,489).

LONNIE HARDEN, brought a sack of items. (R-494).

T. R. SHANKS, Montgomery Police Department, was at the time an evidence technician. He did the crime scene investigation for evidence. He got a call at 11:45 and got there at 11:50 a.m. He described his findings and identified exhibits. (R-494-503).

ROBERT WAYNE BULLOCK, stated he was the son of the deceased. He identified a picture of his father and described his father and his businesses. (R-527,532).

LONNIE HARDEN, (recalled) , a firearms expert with the State Department of Forensic Sciences told of his qualifications and findings. (R-534,538).

REX HUSSEY JONES, aged 26, told of his criminal record; he knows Womack; he knows Charles Johnson; he saw them on February 2, 1981, on the corner of Goode and Early; it was

about 2:30. Womack said they had been on a lick; the bitch would not give no money; I asked him if anybody got hurt; he said he had to shoot the bitch in the face; he said he saw guns on both Womack and Johnson. (R-546,560).

R. T. WARD, Montgomery Police Department, Robbery-Homicide Division, told of his contact with Womack; the taking of a statement from him; and the rest of his part in the investigation. (R-628-726).

TABLE OF AUTHORITIES CITED

Case	cited at page
Garrett vs. State 369 So.2d 833	9
Jurek vs. Estelle 633 F.2d 985(1980)	9
Ritter vs. State 375 So.2d 270	10
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Ex Parte Kyser 399 So.2d 330	10

STATEMENT OF ISSUES PRESENTED FOR REVIEW

H.N.

ISSUE ONE: Was reversible error committed by permitting the statement of Womack to police to be introduced?

Garrett vs. State
369 So.2d 833

Jurek vs. Estelle
633 F.2d 985(1980)

EdC

ISSUE TWO: Should the death penalty be imposed on Womack?

Ritter vs. State
375 So.2d 270

Beck vs. Alabama
65 L.Ed 2d 352

Enund vs. Florida
U.S. Law Week (July 2, 1982)

Evans vs. State
361 So.2d 666

Ex Parte Kyser
399 So.2d 330

ARGUMENT

AS TO ISSUE ONE: Womack went to police headquarters voluntarily. It was evident that he was questioned by several police detectives. It is not denied that he arrived there on February 6, 1981, in the afternoon, and was questioned continuously that day.

Evidently out of that questioning something happened to cause one of the detectives to make a written memorandum on one of the rights forms Womack refused to sign, a statement to the effect that Womack could not read or write and did not know what he was signing.

The evidence is clear that information was exchanged between all of the officers working on the case.

On February 7, 1981, about 9 p.m., Officer Ward, who does not remember many things, particularly if he had seen the memorandum or not, was asked to try his luck with Womack. Whammo! No problem at all according to Ward. It is a strange coincidence indeed that as to the reason he signed the statement for Ward, the response of Womack was very similar to the reason one William Bush gave in his statement to this Officer Ward.

The State did not choose to travel on an oral statement made by Womack. They wanted and got the right to have a written statement introduced that the jury could read, feel, and take to the juryroom with them. It is this same written statement that Womack could not read because he did not know how and did not understand.

The Supreme Court of Alabama in Garrett vs. State, 369 So.2d 833, reversed a case under somewhat similar circumstances.

The United States Court of Appeals, Fifth Circuit, in Jurek vs. Estelle, 623 F.2d 985 (1980), has many citations relevant to the subject.

AS TO ISSUE TWO: The law is clear that the imposition of the death penalty can permit no known risk for an unwarranted conviction. Beck vs. Alabama, 65 L.Ed 2d 352. It has been said that a capital case is due process at it's finest. We like this term better.

This Court now sits not only as a reviewing Court but as a second jury. We have not meant to be too general in the way we have formed this issue. But as we see it, it is the best way. Why then should Womack live?

Womack should live because it is highly unlikely that as efficient as the Montgomery Police Department is, as many notes as they made and records they kept, and as efficient as Detective Ward is, he did not positively know that another Officer just as efficient as he is, had made a conspicuous memorandum in writing that Womack did not know what he was signing.

Womack should not die because whereas it could be said that procedurally the State could submit the issue of whether Womack was a principle or an accomplice to the jury, the end result was and is, that it is an undeniable fact that the evidence was so weak and conflicting that the State did not know what Womack was, if anything. Even the trial Judge did not know and so stated in his findings. Nobody knows, and to say that the jury knew is the purest of conjecture. This is important and it is wrong because the Supreme Court of the United States has held in Enund vs. Florida, U.S. Law Week (July 2, 1982) that to put a non-killing accomplice to death violates the Constitution.

What is the physical evidence in this case? No gun was ever found. No fingerprints were found.

Was the felony murder doctrine used to convict Womack? It is forbidden to do this. Evans vs. State, 361 So.2d 666. If not, then what evidence is there to support the death penalty? This case is not like Ex Parte Kyser, 399 So.2d 330, where the crime itself may apply to uphold the death penalty. Of vital importance is that the trial Court failed to instruct the jury that for them to find Womack guilty as an accomplice that if presence with a willingness to assist is relied on, there must be the additional element that the principal knew this. See Ritter vs. State, 375 So.2d 270.

These, we submit, are some of the reasons that Womack should live.

CONCLUSION

We ask this Court to find that the evidence in this case is such that the death penalty should not be imposed.

If the above is not the wisdom of the Court, we asked that the case be reversed and Womack be granted a new trial.

RESPECTFULLY SUBMITTED,

George W. Cameron

GEORGE W. CAMERON
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby cerrtify that I have served a copy of the foregoing upon the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this the 21 day of September, 1982.

George W. Cameron

ATTORNEY FOR APPELLANT

SUMMARY OF ADVERSE RULINGS

RECORD PAGE NO.:	ACTION:
19-20	Court overrules defendant's objection
32	State's objection to evidence sustained.
40-41	" " " "
71	" " " "
116	" " " "
149	" " " "
156	" " " "
172	" " " "
238	Defendant's objection to evidence overruled
246-247	" " " "
249	" " " "
250	" " " "
253	" " " "
319-321	State's objection to evidence sustained.
416	Defendant's objection to jurors overruled.
421-422	Defendant's motion denied.
427	State's objection sustained.
435	" "
443-444	Defendant's objection overruled.
483	" "
513-514	" "
518-519	" "

RECORD PAGE NO.:	ACTION:
639	Defendant's objection overruled.
695	State's objection sustained.
711	" " "
724-726	Defendant's motions denied.
853-854	Defendant's objections overruled.
860-864	Motion in limine overruled.
866-877	Defendant's objections overruled.
879	" " "
922	State's objection sustained.
933	" " "
975-976	Court denies defendant grand jury statement of witness.
984	State's objection sustained.
1098-1101	Defendant's motion for mistrial denied.
1103	Motion to set aside verdict denied
1133	Defendant's motion for discovery partially denied.
1135	Motion to suppress denied.
1137	Voir dire motion denied.
1141	Motion for production partially denied.
1142	State's motion in limine granted.
1145-1147	Writtne charges refused.
1153	Motion for new trial denied.

EXHIBIT D

FEB 15 1983
ALA COURT CRIMINAL APPEALS
MOLLIE JORDAN, CLERK

CLARENCE WOMACK,

APPELLANT * IN THE COURT OF CRIMINAL

APPEALS OF ALABAMA

*

VS. 3 DIV. 567

*

ON APPEAL FROM THE MONT-

STATE OF ALABAMA, * GOMERY CIRCUIT COURT.

APPELLEE

****

BRIEF AND ARGUMENT OF APPELLANT ON REHEARING

****

GEORGE W. CAMERON
246 SO. COURT ST.
MONTGOMERY, AL 36104
ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES CITED

AUTHORITY	CITED AT PAGE NO.
Ritter Vs. State 375 So. 2d 270	4 and 7
Rule 39 ARAP	4 and 8
Jurek Vs. Estelle 633 Fed. 2d 985 (1980)	4 and 5

STATEMENT OF THE CASE

The Statement of the Case set out in former brief is hereby adopted. Additionally, the Court has confirmed the case by opinion dated February 1, 1983. Appellant now applies to this Court for re-hearing.

STATEMENT OF THE FACTS

The Court has set out a careful and detailed statement of facts from the record in this case. We file herewith a motion under Rule 39(k), ARAP, setting forth matters regarding the facts as found by the Court in its decision of February 15, 1983.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Was reversible error committed by permitting the statement of Womack to be introduced?

Jurek Vs. Estelle
633 Fed. 2d 985 (1980)

ISSUE TWO: Did the trial Court correctly charge the jury on the issue of aiding and abetting and does Alabama recognize the plain error doctrine?

Ritter Vs. State
375 So. 2d 270

Rule 39 ARAP

ARGUMENT

AS TO ISSUE ONE: We would ask the Court on re-hearing to again carefully consider the admissibilty of the statement of the defendant. We have asked by a Rule 39(k) Motion that the Court find additional facts to exist. These in general deal with the knowledge or lack of knowledge of Officer Ward of the literacy of the defendant.

It is our position that the State in this case did not overcome the burden placed upon them by the prima facie inadmissibility of statements and particularly in this case.

Jurek Vs. Estelle
633 Fed. 2d 985 (1980)

AS TO ISSUE TWO: We must respectfully disagree with the decision of this Court dated February 1, 1983, wherein this Court said the jury was correctly or properly charged.

Specifically, we again assert that the charge of the Court to the jury with reference to aiding and abetting is in error.

Set out below from pages 1033 and 1034 of the record is what the Court charged the jury on aiding and abetting:

> "Now, I have written the word "complicity" down here, and let me explain to you the significance of that. The Defendant, as I have said, is charged with the capital offense of committing a robbery, and while in the course of committing the robbery or attempting to commit a robbery, intentionally killing Arthur D. Bullock. There was testimony in this case that there was more than one person present at Mr. Bullock's store. And when I say there was testimony, I mean only that there was testimony. I don't say that as a fact. You have to determine if those are the facts with regard to somebody else. I'm just saying that there was testimony in the case that there was an accomplice. But that is a fact for you to determine.
>
> The question then comes up how does this relate to Mr. Womack. Can more than one person be guilty of the same offense, and the answer is yes. And I will outline the law to you with regard to that.
>
> Alabama law is a person is legally accountable for the behavior of another constituting a criminal offense if with the intent to promote or assist the commission of the offense, one, he procures, induces, or causes such other person to commit the offense; or, two, he aids or abets such other person in committing the offense. In that regard, just being present at the scene of City Curb Market would not constitute help. Just being there or failing to prevent something from happening, seeing something happening and not preventing it, would not constitute one an aider and abetter. But being there, being ready, willing and able to assist overtly, affirmatively assist either by words or acts or by whatever become necessary to commit that crime, would constitute one, an aider and abetter, and would render him as guilty as if he himself had committed the acts which constitute or comprise the crime."

The Court mentioned aiding and abetting in other parts of its charge which we have not here set out. We have painfully read and re-read the charge of the Court and cannot find anywhere in it anything that would be materially different from that which we have above set out.

We say to you that based on the decision of the Supreme Court of Alabama in Ritter Vs. State, 375 So. 2d 270 , the charge of the trial Court in this respect was not correct, but to the contrary was in error. It was in error because in Ritter the Supreme Court in effect held there are two factors involved in liability as an accomplice. One is encouragement. Two is presence with a view to render aid should it become necessary. When liability is predicated upon the latter it is essential that the principal be aware of the accomplice's support and willingness to lend assistance.

It must be remembered that in this case the Court submitted both types of aiding and abetting to the jury. That is, in substance, that Womack encouraged Nanny Goat Johnson to murder Bullock or that Womack was present ready and willing to give aid if necessary.

The jury in this Womack case convicted him not knowing that it was necessary that, if that be the case, it was necessary that Nanny Goat Johnson know of Womack's willingness to assist if necessary. This was wrong and it was error.

It is true that this was not objected to by trial counsel for Womack. But the fact that the Supreme Court held

in Ritter that Ritter had waived the error is by no stretch of the imagination authority that Womack waived it. Ritter begged the jury to give him death. He said that he would have killed the victim himself had the gunman not been in the way. This is a far cry from the evidence in this Womack case.

This leaves us with the real issue in this case and that is will the Courts of Alabama apply the plain error doctrine. Our position is that by adopting Rule 39, ARAP, the Supreme Court of Alabama set forth the policy in this State of plain error just as strong if not stronger than the Federal rule on the subject and that they are duty bound to apply it.

CONCLUSION

We would respectfully ask this Court to carefully reconsider it decision of February 1, 1983, and render a decision reversing the case. Should the Court not see fit to do this, then, we would ask that the Court extend its decision to address the matters herein raised.

Respectfully submitted,

George W. Cameron
246 So. Court St.
Montgomery, Al 36104
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief and argument on the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this 15 day of February, 1983.

Attorney for Appellant

EXHIBIT E

CLARENCE WOMACK,

PETITIONER * IN THE SUPREME COURT

OF ALABAMA

VS. *

S. C. CASE NO._____

*

ON PETITION FOR A WRIT

STATE OF ALABAMA, * OF CERTIORARI

RESPONDENT

****

BRIEF AND ARGUMENT OF PETITIONER

****

GEORGE W. CAMERON
246 SO. COURT ST.
MONTGOMERY, AL 36104
ATTORNEY FOR PETITIONER

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Beck Vs. State 396 So. 2d 645	11
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Jurek Vs. Estelle 633 Fed. 2d 985 (1980)	5 and 6
Ritter Vs. State 375 So. 2d 270	5, 8 and 9
Beck Vs. Alabama 65 L. Ed. 2d 352	11
Enund Vs. Florida U. S. Law Week (July 2, 1982)	5 and 11
Evans Vs. State 361 So. 2d 666	11
Ex parte Kyser 399 So. 2d 330	

STATEMENT OF THE CASE

The statement of the case is set forth in the Petition for certiorari. The same are hereby adopted by reference.

STATEMENT OF THE FACTS

The facts are complex in that the Court of Criminal Appeals attempted to set forth the facts in its decision in the case.

We do not agree with the pertinent facts as found by that Court. We have filed a Rule 39(k) motion with reference to some. We realize that in finding facts Appellate Courts must do so in line with what the jury did. However, due to the nature of the punishment in this case, we would ask this Court to carefully read the entire transcript of evidence.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE ONE: Was reversible error committed by permitting the statement of Womack to police to be introduced?

Garret Vs. State
369 So. 2d 833

Jurek Vs. Estelle
633 Fed. 2d 985 (1980)

ISSUE TWO: Was the charge of the Court to the jury on aiding and abetting erroneous?

Ritter Vs. State
375 So. 2d 270

Enund Vs. Florida
U. S. Law Week (July 2, 1982)

ISSUE THREE: Should the death penalty be imposed on Womack?

Enund Vs. Florida
U. S. Law Week (July 2, 1982)

ARGUMENT

AS TO ISSUE ONE: Much of the record in this case pertains to the circumstances under which Womack gave a statement to officer Ward of the Montgomery Police Department. We are confident that this Court will read carefully the entire record in this case. By our brevity, we do not wish this issue to be considered weak. It is strong.

Of importance is that Womack was questioned by different officers. He claimed brutality. He claimed the statement was not voluntarily signed.

One Officer notated on a rights form that Womack did not understand what he was signing. Womack could not read and write, except his name. He refused to sign a rights form.

We are not satisfied with the facts set out in the opinion of the Court of Criminal Appeals on this issue. We have tried by a Rule 39(k) Motion to have that Court extend its decision to find certain facts. They did not. We have renewed it in this Court. What we are attempting to show is that Officer Ward knew of the memorandum that had been made. The case was discussed with other Officers in the Montgomery Police Department.

It is our position that a confession is presumed to be inadmissible. The burden is on the State to overcome this presumption. This is no light burden. Jurek Vs. Estelle 633 Fed. 2d 985 (1980) and cases cited therein. Garret Vs. State 369 So. 2d 833

AS TO ISSUE TWO: There is no question but that the Court gave the jury the wrong instructions on aiding and abetting. Set out below is the charge of the Court from pages 1033-1034 of the record:

"Now, I have written the word "complicity" down here, and let me explain to you the significance of that. The Defendant, as I have said, is charged with the capital offense of committing a robbery, and while in the course of committing the robbery or attempting to commit a robbery, intentionally killing Arthur D. Bullock. There was testimony in this case that there was more than one person present at Mr. Bullock's store. And when I say there was testimony, I mean only that there was testimony. I don't say that as a fact. You have to determine if those are the facts with regard to somebody else. I'm just saying that there was testimony in the case that there was an accomplice. But that is a fact for you to determine.

The question then comes up how does this relate to Mr. Womack. Can more than one person be guilty of the same offense, and the answer is yes. And I will outline the law to you with regard to that.

Alabama law is a person is legally accountable for the behavior of another constituting a criminal offense if with the intent to promote or assist the commission of the offense, one, he procures, induces, or causes such other person to commit the offense; or, two, he aids or abets such other

person in committing the offense. In that regard, just being present at the scene of City Curb Market would not constitute help. Just being there or failing to prevent something from happening, seeing something happening and not preventing it, would not constitute one an aider and abetter. But being there, being ready, willing and able to assist overtly, affirmatively assist either by words or acts or by whatever become necessary to commit that crime, would constitute one, an aider and abetter, and would render him as guilty as if he himself had committed the acts which constitute or comprise the crime."

The Court mentioned aiding and abetting in other parts of its charge which we have not here set out. We have painfully read and re-read the charge of the Court and cannot find anywhere in it anything that would be materially different from that which we have above set out.

We say to you that based on the decision of the Supreme Court of Alabama in Ritter Vs. State, 375 So. 2d 270 , the charge of the trial Court in this respect was not correct, but to the contrary was in error. It was in error because in Ritter the Supreme Court in effect held there are two factors involved in liability as an accomplice. One is encouragement. Two is presence with a view to render aid should it become necessary. When liability is predicated upon the latter it is essential that the principal be aware of the accomplice's support and willingness to lend assistance.

It must be remembered that in this case the Court submitted both types of aiding and abetting to the jury. That is, in substance, that Womack encouraged Nanny Goat Johnson to murder Bullock or that Womack was present ready and willing to give aid if necessary.

The jury in this Womack case convicted him not knowing that it was necessary that, if that be the case, it was necessary that Nanny Goat Johnson know of Womack's willingness to assist if necessary. This was wrong and it was error.

It is true that this was not objected to by trial counsel for Womack. But the fact that the Supreme Court held in Ritter that Ritter had waived the error is by no stretch of the imagination authority that Womack waived it. Ritter begged the jury to give him death. He said that he would have killed the victim himself had the gunman not been in the way. This is a far cry from the evidence in this Womack case.

This leaves us with the real issue in this case and that is will the Courts of Alabama apply the plain error doctrine. Our position is that by adopting Rule 39, ARAP, the Supreme Court of Alabama set forth the policy in this State of plain error just as strong if not stronger than the Federal rule on the subject and that they are duty bound to apply it.

In the recent decision of William Bush Vs. State, this Court did not hesitate to do its duty and address error which was apparent on the record or plain error whether objected to or not. The charge of the Court in this Womack case was wrong and it was error. This Court should notice it and reverse because of it.

AS TO ISSUE THREE: The law is clear that the imposition of the death penalty can permit no known risk for an unwarranted conviction. Beck Vs. Alabama, 65 L. Ed. 2d. 352.

Was the felony murder doctrine used to convict Womack in this case? Evans Vs. State, 361 So. 2d 666.

It is our position that Beck Vs. State, 396 So. 2d 645, put great stress on cases just such as this one. What we are talking about is that Womack made a statement to police which has been attached every known way. Nanny Goat Johnson did not make a statement. Womack must die and the case against Johnson was dismissed. This Court knows and we know that cases like the evidence showed against Johnson are confirmed every day. We are not asking that Johnson have cast upon him the fate which has befallen Womack. What we are saying is what on earth was meant when it was said that punishment to the co-defendant should be taken into consideration? The irony of it all is that Womack's statement did not say that he did the killing. It was a far cry from it.

The Court of Criminal Appeals put great weight on the testimony of the witness Rex Hussey Jones. A close reading of the testimony of this man weakens his testimony to the extent that no man should die based on it. Evidence pointing backward to an act should be closely scrutinized.

It is our further position that this case comes within the doctrine of Enund Vs. Florida, U. S. Law Week (July 2,

1982). Womack, even in his statement to the police, which we again question the voluntariness of, was saying "I did not kill, I did not intend to kill, I did not know there would be a killing." This Court is going to have to do more than the Court of Criminal Appeals did on this issue. A reading of all of the evidence in the above cited case shows it to be far stronger than the evidence against Womack. The real killer does not have to be caught or prosecuted for this doctrine to apply.

CONCLUSION

In this Womack case we have done all within our resources and legal ability to point out why he should have relief.

We are impressed with this Court in its application of the doctrine of apparent error. Although, we have done all we know to do, we feel there is something that has escaped us. We would therefore urge this Court to search as you have never searched before because this case is different. It just seems that this is a case wherein the judicial machinery is about to break down if something is not done by this Court.

We are confident that this Court will give every favorable consideration to this case.

Respectfully submitted,

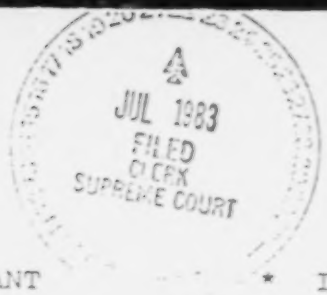
George W. Cameron

George W. Cameron
246 So. Court St.
Montgomery, Al 36104
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief and argument on the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this 14 day of March, 1983.

George W. Cameron
Attorney for Appellant



CLARENCE WOMACK

APPELLANT * IN THE SUPREME COURT OF ALABAMA

VS. * S.C. NO. 82-546

STATE OF ALABAMA, * ON APPEAL FROM THE MONTGOMERY CIRCUIT COURT.

APPELLEE

****

APPLICATION FOR REHEARING AND
BRIEF AND ARGUMENT OF APPELLANT ON REHEARING

****

GEORGE W. CAMERON
246 SO. COURT ST.
MONTGOMERY, AL 36104
ATTORNEY FOR APPELLANT

CLARENCE WOMACK
APPELLANT

VS.

STATE OF ALABAMA
APPELLEE

* IN THE SUPREME COURT
* OF ALABAMA.
* S.C. CASE NO. 82-546
* FROM THE MONTGOMERY CIRCUIT COURT.

MOTION FOR RE-HEARING

The Appellant respectfully moves the Court to set aside and hold for naught its decision dated July 8, 1983, and grant unto him a re-hearing.

Upon a re-hearing he prays that the Court will write a decision reversing and granting unto him a new trial.

Respectfully Submitted,

George W. Cameron

George W. Cameron
246 So. Court St.
Montgomery, Al 36104
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing documents on the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this 22nd. day of July, 1983.

George W. Cameron
Attorney for Appellant

ARGUMENT

In original brief we pointed out clearly our positions. This Court responded one by one to those positions with a decision adverse to us in every instance. We cannot in good faith accuse this Court of not doing its duty as it sees it.

We can and we must, however, ask this Court to carefully reconsider its decision.

AS TO ISSUE ONE:

With respect to allowing the statement of the accused to be introduced into evidence, we would respectfully ask the Court to consider its decision of July 8, 1983, with particularity considering the principal that all confessions are presumed to be inadmissible and the burden is on the State to overcome this presumption. Reedy Vs. State, 20 So. 2d 528.

AS TO ISSUE TWO:

As to whether or not the instruction on aiding and abetting should be noticed under the "plain error" doctrine, we would ask this Court to carefully consider its Rule 39, ARAP, which recognizes this humanitarian principal of law. We would ask that the Court consider that this is a case wherein the death penalty has been ordered.

We would further ask the Court to extend its opinion on this point and set forth what affect, if any, the case of Enund Vs. Florida , U. S. Law Week, July 2, 1982, has upon this Womack case.

We would further ask this Court to hold that in a death case a properly instructed jury is required by due process. And further that the plea of not guilty entered by Womack in the trial of his case cast upon the State the burden of proving the case against him beyond a reasonable doubt regardless of what special defense may have been testified to by Womack. And that Womack was entitled to a correct instruction as part of the general law of the case.

We with further ask this Court to hold where the trial Court gives its oral charge to the jury and undertakes to give an instruction on a subject, then that oral charge should be correct.

AS TO ISSUE THREE:

We again ask this Court to consider that in this capital case there is a serious question of whether Womack was an accomplice who did not intend to take life; the principal; or whether he was innocent. It is difficult to imagine a greater disparity of sentences than for Womack to die and Nanny Goat Johnson to go free upon a consideration of all of the evidence.

CONCLUSION

We have sought to represent Womack to the best of our ability throughout these appellate proceedings. We have once again herein appealed to this Court for re-consideration. We would respectfully ask this Court to carefully consider the matters we have herein pointed out. We know that you will.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief and argument on the Attorney General of Alabama by causing a copy of the same to be hand delivered to his Office on this 22 day of July, 1983.

George W. Cameron

Attorney for Appellant